There was no express prohibition of any particular individual driving the car as there was in the case of *Paget* v. *Poland.*[1] In the circumstances the inference seems irresistible that there was an implied consent to the car being driven by the deceased or any other member of the deceased's party who was a licensed driver.

In that connection our attention was drawn to the following observations by Diplock L.J. in the case of *Tappenden* v. *Artus,*[2] the report of which was not available to the trial judge:—

"The grant of authority to use goods is itself to be construed as authority to do in relation to the goods all things that are reasonably incidental to their reasonable use. If the bailor desires to exclude the right of the bailee to do in relation to the goods some particular thing which is reasonably incidental to their reasonable use, he can, of course, do so, but he must do so expressly."

For the respondents it was argued that these observations were not altogether in point because the bailment in that case was not, as here, a purely gratuitous one. In my view the point is without substance. The principal difference between a gratuitous bailment and a bailment for valuable consideration lies in the standard of care which the bailee owes to the bailor in relation to the chattel involved. This might well have been relevant had there been any question of Yong Choy being notoriously a bad driver or if he, with or without the deceased, had used the motor-car to go off on some frolic which had no connection with the wedding trip to Segamat. Had there been anything of the sort the inference of implied permission might well not have arisen. But there was nothing of the sort.

I would add that I am fortified in this view by the following observations of Lord Carmont (in relation to the interpretation of section 35 of the Road Traffic Act, 1930) which were quoted by the House of Lords in the case of *McLeod* v. *Buchanan*:— [3]

"I think that anyone who parts with the control of a motor vehicle completely, without making any definite arrangement with the custodian as to use, impliedly permits all uses".

I would add that since writing this judgment I have seen the report of the judgment of the House of Lords in the case of *Kelly* v. *Cornhill Insurance Co. Ltd.*[4] which is the latest case on this subject. I can find nothing there which inclines me to depart from anything I have said.

In the circumstances I would allow the appeal with costs and order that judgment be entered for the original plaintiffs as prayed.

Chua and **Winslow JJ.** concurred.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw*; *Battenberg & Talma.*

KHOR AH KAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J.) April 18, 1964]

[Penang — Criminal Appeal No. 5 of 1964]

Penal Code, s. 353 — Using criminal force on police constable in execution of duty — Intent to deter him from his duty as public servant —Whether charge bad for duplicity — Onus on the prosecution.

Criminal Procedure — Charge — Duplicity — Whether separate offences may be charged conjunctively if they arise out of the same transaction.

The appellant who had been convicted under section 353 of the Penal Code appealed on two grounds. She contended, firstly, that the charge was bad for duplicity in that it alleged that (i) she had used criminal force on a police constable in the execution of his duty as a public servant and (ii) that she had done it with intent to deter the police constable from discharging his duty as a public servant. It was argued that these were two separate and distinct offences contemplated under section 353 and therefore the charge was bad. Secondly, it was argued that the prosecution had failed to prove that the police constable was acting in the execution of his duties.

Held: (1) the charge was not bad for duplicity because although the offences charged were separate offences, they were charged conjunctively, and this was permissible because the matter related to one single incident;

(2) the prosecution failed to prove that the police constable was in law a public servant acting "in the execution of his duty".

Cases referred to:—

(1) *R.* v. *Wells, etc. JJ., Ex parte Clifford* (1904) 91 L.T. 98.

(2) *R.* v. *Wilmot* [1933] All E.R. Rep. 628.

(3) *R.* v. *Clow* [1963] 2 All E.R. 216.

(4) *Public Prosecutor* v. *Kok Khee* [1963] M.L.J. 362.

CRIMINAL APPEAL.

David Choong for the appellant.

Wan Ismail bin Wan Mohd. Salleh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant was charged in the Magistrate's Court, Penang, as follows:—

"You are charged that you on the 2nd day of November, 1963, at about 11.45 a.m. at the five foot-way, of 'Zlin' Shoe Store, Penang Road, Penang, in the State of Penang, did use criminal force on one Ismail bin Ramli, police constable No. 30526, a public servant in the execution of his duties, to wit by hitting him with a slipper and tugging at his uniform with intent thereby to deter the said Ismail bin Ramli, police constable 30526, from the discharge of his duties as such public servant and that you have thereby committed an offence punishable under section 353 of the Penal Code".

The appellant was convicted and fined $100 in default one month's imprisonment. From this conviction and sentence the appellant appealed.

The two main grounds of appeal, and the only ones with which we are concerned, were (1) that the charge was bad for duplicity and (2) that the prosecution had failed to prove that the police constable was acting in the execution of his duties at the relevant time.

The appellant submitted that the charge was bad for duplicity because it charged her with using criminal force on a police constable being a public servant in the execution of his duty as such public servant and also with intent to deter that person discharging his duty as such public servant which are separate and distinct offences under section 353 of the Penal Code. I do not think there is any doubt that there are six different offences contemplated in section 353 of the Penal Code. That section provides that whoever firstly assaults or secondly uses criminal force to any person being a public servant either (1) in the execution of his duty as such public servant or (2) with intent to prevent or deter that person from discharging his duty as such public servant or (3) in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished as provided in the section. If therefore a person is charged with using criminal force to any person being a public servant "in the execution of his duty as such public servant or with intent to deter that person from discharging his duty as such public servant" that charge would be bad for duplicity as there are two separate offences charged in the alternative (*R.* v. *Wells, etc. JJ., Ex p. Clifford* [1] and *R.* v. *Wilmot* [2]).

The operative wording in the present charge however is as follows:—

> "....a public servant in the execution of his duties ....with intent to deter the said Ismail bin Ramli, police constable 30526, from the discharge of his duties as such public servant...."

In my opinion this charge is not bad for duplicity because, although the offences charged are separate offences, they are charged conjunctively and it is permissible to do so where, as in the present case, the matter relates to one single incident. The authority for this is *R.* v. *Clow* [3] in which a number of cases which were or were not held to be bad for duplicity were considered and distinguished. In the present case the words in the charge "with intent to deter the said Ismail bin Ramli, police constable 30526, from the discharge of his duties as such public servant" were unnecessary and all the prosecution achieved by using them was to saddle themselves with the additional burden of proving the particular intent alleged.

I accordingly held that this ground of appeal failed.

On the second ground of appeal the facts which were disclosed in the evidence were in brief that the son of the appellant was selling handkerchiefs on a small stall on the five foot-way of Penang Road, Penang, a short distance away from where the appellant also was selling articles on a stall. On the record it was not at all clear what provision of what law the son of the appellant was alleged to have broken. It was also not clear whether the son of the appellant was at any time under arrest. Even if it had been clear that he was supposed to be under arrest, as it was not known what provision of what law he was supposed to have transgressed, it would have been impossible to say whether that arrest was legal or illegal. The facts were not altogether dissimilar from those in the case of *Public Prosecutor* v. *Kok Khee* [4] in which on the facts the learned judge stated:—

> "The facts as stated in skeleton outline would appear to justify the respondent putting up a struggle since he was resisting an illegal or unjustifiable use of force towards him. Unless and until an arrest had been made legally, in the proper form, as set out in section 15(i) of the Criminal Procedure Code — and there is nothing to suggest that this had been done — the respondent was, in my opinion, entitled to prevent or resist what ostensibly was an unlawful seizure or confiscation of the 'daching' which was his private property".

In the present case it is not at all clear what the situation was. It may very well be that the police constable was legally entitled to arrest the appellant's son and had in fact done so and was entitled to take possession of the handkerchiefs, etc. for the purpose of producing them as exhibits at a later stage, but we do not know. The prosecution however failed to prove that this was the case, that is to say failed to prove that the police constable was in law a public servant acting "in the execution of his duty".

Accordingly I allowed the appeal, quashed the conviction and sentence and ordered the fine to be repaid.

Appeal allowed.

Solicitors: *Lim, Lim & Oon.*

MURAD v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Tan Ah Tah F.J.) April 27, 1964]

[K.L. — Federal Court Criminal Appeal No. 17 of 1964]

Penal Code, s. 302 — Murder — Provocation — Direction to jury — Matters relating to human psychology — State of mind between loss of self-control occasioned by provocation and insanity — Whether court should take cognisance of.

The appellant was convicted for murder in contravention of section 302 of the Penal Code. On appeal the conviction was attacked on the ground that the trial judge's direction to the jury as to provocation was not satisfactory in that it overlooked certain matters relating to human psychology, in particular the existence of a state of mind that is between the loss of self-control occasioned by provocation and some form of insanity.

Held: having read the statement of the law by the trial judge and having heard it discussed there was nothing in it which was not justified by the wording of the Penal Code or decisions of the English courts (which the court was compelled to treat with respect) nor was there any omission in it. The appeal should therefore be dismissed.